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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 242 60611 Office: CALIFORNIA SERVICE CENTER Date: JAN 22 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosenberg

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation that is engaged in international telecommunications services. It seeks to employ the beneficiary as its manager of calling card services and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the petitioner's employment of individuals in managerial positions is consistent with the nature of the petitioner's business.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The petitioner is a subsidiary of DACOM Corporation of Korea that employs six persons and has a gross annual income of $18 million. In the initial I-140 petition, the proffered position was called director, calling card services, and it carried with it the following duties:

1. **Manage all aspects of the Prepaid Calling (Phone) Card**
   - ⇒ Manage the development of PPC platform system, networking, and Call Center operation
   - ⇒ Marketing and Contract negotiations with customer;

identify decision-makers in various industries and develops business relationships with these managers and other professionals to maintain the existing customer base and extand [sic] that base

⇒ Traffic forecasting for international capacity procurements and adjustments: negotiation with carriers for quality improvement.

2. **Manage all aspects of Prepaid Wireless Services development**
   ⇒ Manage the development of Prepaid Wireless Systems and Networking
   ⇒ Contract negotiation with carriers

3. **The development of new business**
   ⇒ Oversees and develops new business, such as VoDSL based services and Wireless Internet Services

4. **Develop short-term and long-term strategic plans**
   ⇒ Analyze the buying pattern of market segmentation
   ⇒ Improve the productivity and profitability of the market sectors
   ⇒ Develops and implements business plans to increase market share

The organizational chart that the petitioner submitted indicated that the proffered position shared supervisory authority over one senior manager of engineering, one senior manager of marketing and sales, and one senior manager of finance and administration.

The director found that the proffered position was neither executive nor managerial in nature, and she denied the petition on this basis. The director based this decision on inconsistent evidence in the record regarding the number of the petitioner's employees and the positions they occupy. The director also noted that the petitioner did not identify who would perform the daily non-managerial duties in light of the fact that all of its employees held managerial titles.

On appeal, counsel states that the petitioner does not need to hire individuals in non-managerial positions because the petitioner contracts its customer service support and retail services to outside companies, and also relies upon professional service companies such as accounting and law firms and miscellaneous service agents. Counsel maintains that the petitioner's employees are all at the managerial level and the director ignored the reasonable needs of the petitioner in light of its organizational structure and stage of development when determining that the beneficiary did not work in a primarily executive or managerial capacity.

In support of his assertions, counsel submits the petitioner's annual report, copies of contracts between the petitioner and outside contractors, a second organizational chart, a job description of the proffered position, job descriptions of the positions subordinate to the proffered position, the petitioner's 2001 payroll records, and the petitioner's latest DE-6 payroll record.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

(A) Directs the management of the organization or a major component or function of the organization;

(B) Establishes the goals and policies of the organization, component, or function;

(C) Exercises wide latitude in discretionary decision-making; and

(D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(C) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

The Service cannot find that the proffered position is in an

executive or managerial capacity because the petitioner has not presented consistent information regarding the title of the position, the duties of the position, or the proffered position's level of authority within the petitioner's organizational hierarchy.

In the initial I-140 petition, the petitioner stated the title of the proffered position as director, calling card services. The duties associated with the position, as described by the petitioner, focused on the "overall management of customer based services and development of new business." On appeal, however, the petitioner changes both the title and the duties of the proffered position in an apparent effort to persuade the Service that the position is in an executive or managerial capacity. The position's new title is general manger of the marketing and development department, and the duties of this position focus on marketing and development tasks; none of the duties relate to the petitioner's calling card services.

Furthermore, the initial organizational chart indicated that the proffered position had shared supervisory responsibility over three managers in the areas of marketing, engineering and sales. A second organizational chart, which lists the proffered position as general manager of the marketing and development department, now indicates that the proffered position has sole supervisory authority over the marketing and engineering departments, each of which is headed by a manager.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). Here, the petitioner has not provided any explanation for why the title, duties and place in the organizational hierarchy of the proffered position have changed. Such material modifications to the essential elements of the proffered position prevent the Service from being able to find that the beneficiary would be employed in a primarily managerial or executive capacity. There is insufficient evidence to find that the petitioner established eligibility for the benefit sought at the time of filing the immigrant petition; an immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the director's decision to deny the petition will not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.